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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

CARL I. COHEN,

Petitioner,

—v—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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No. .

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—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Carl I. Cohen, prays that a writ of certiorari issue to review the order or judgment entered in this case by the Court of Appeals of the State of New York on July 8, 1966, hereinafter described.

Opinions Below

The Court of Appeals of the State of New York did not write an opinion; two Judges of that Court (Desmond, C. J., and Fuld, J.) dissented in an opinion which is printed in Appendix B hereto, *infra,* as part of the "memorandum" report of the decision of the Court of Appeals, reported in 18 N.Y. 2d 650, — N.Y.S. 2d —. The opinion of the Appellate Division, Second Department, Supreme Court of New York, is reported in 24 A. D. 2d 900, 264 N.Y.S. 2d 886, and is printed in Appendix C hereto, *infra.* The opinion of the Supreme Court of New York, Kings County (Rinaldi, J.), is reported in 42 Misc. 2d 403, 248 N.Y.S. 2d 339, and is printed in Appendix D hereto, *infra.*

Jurisdiction

The judgment or order of the Court of Appeals of the State of New York sought to be reviewed was dated July 7, 1966. That judgment or order affirmed, after full appeal on the merits, an order of an intermediate appellate court of the State of New York, the Appellate Division of the Supreme Court, Second Department, entered November 29, 1965, which in turn had affirmed with modification an evidence-suppression order granted by the Supreme Court of the State of New York, Kings County (Rinaldi, J.) on motion of the within petitioner who had sought such suppression of evidence (pretrial) in a prosecution for abortion. The pretrial suppression order by Justice Rinaldi vacated an ex parte wiretap order and directed the suppression of evidence procured by such wiretap together with evidence secured by unlawful search and seizure. The above-mentioned appeals resulted in modification of Justice Rinaldi's suppression order by reversing the portion of that order which had vacated the ex parte wiretap order and had suppressed the wiretap evidence; the appeals affirmed the suppression of the search-obtained evidence.

Under the New York State statutory procedure for motion-to-suppress proceedings of the above-mentioned type (N.Y. Code Crim. Proc. §§ 813-c et seq.), the State (the People) is not permitted to pursue the State statutory avenue for review of an order of suppression (such as had here been granted by Justice Rinaldi) without first filing a formal statement asserting that the deprivation of the use as evidence of the items suppressed makes it impossible in law or effectively destroys any reasonable possibility in fact to carry forward the criminal prosecu-

tion involved to a conviction (*id.*, § 518-a). The State filed such a statement in this case as a condition of being permitted to appeal to the Appellate Division from Justice Rinaldi's order of suppression. We submit that, by reason of the statute last cited and the filing by the State of the statutorily required statement just mentioned, it is to be taken that under the law of the State of New York the suppression order of Justice Rinaldi was the equivalent of a final and not merely an interlocutory order in the within proceedings, i.e., Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indictment or indictments involved.

In the appeal taken by the State to the Appellate Division, to review Justice Rinaldi's order of suppression, the partial modification ordered by the Appellate Division had the result of rendering the indictments no longer necessarily impossible to prosecute to a conviction. The petitioner herein then appealed to the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division, i.e., under the judgment or order of the Court of Appeals it is likewise no longer necessarily impossible for the State to prosecute the indictments forward to a conviction.

It is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved. But it is believed that this is not the test of "finality" for the purpose of this Court's certiorari jur-

isdiction in the present instance. Justice Rinaldi's order of suppression did produce a result of finality in view of the New York legislation and practice previously referred to (Code Crim. Proc. §518-a), and it would not seem that the subsequent appellate modifications which revived a practical possibility of continuing the prosecution under the indictments can alter the legal or jurisdictional significance of the fact that petitioner did at one stage have what amounted to a final judgment in his favor (Justice Rinaldi's suppression order), and that now the highest State appellate court has rendered a final judgment depriving petitioner of the benefits of the lower Court's final judgment which, if it had not been modified on appeal, would have terminated the criminal prosecution.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States, and under 47 U.S.C. §605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. §813(a)) on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. §605 as given supremacy by Article VI of the Constitution of the United States.*

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* Our above suggestions as to jurisdictional finality on the instant record make it appropriate to add the following: An earlier stage of this litigation (i.e., of the proceedings by petitioner Cohen seeking suppression of evidence obtained by wiretap and search) was before this Court in *Cohen* v. *New York*, 375 U.S. 985 (Oct. Term 1963, No. 640), cert. denied. In the latter proceeding we called attention to the suppression proceeding, then concurrently pending, which has now eventuated in the present petition for certiorari, and we noted the jurisdictional problems

Questions Presented

1. Where State Courts in an abortion prosecution have voided a search of a physician's office on Fourth Amendment grounds and have ordered the product of the search suppressed for use as evidence in the abortion prosecution; and where the local police prior to the search had maintained at the same office premises a telephone wiretap authorized by ex parte Court order under permissive State wiretap legislation; and where the police claim to have lost or discarded important records taken in the search which would have disclosed which sources of evidence (names of female patients of the physician) for use at the abortion trial came from the voided search and which came from the wiretap; and where the State Court of first instance which conducted the hearing on the motion to suppress the product of the search and the wiretap has ordered suppression of both such products on the ground *inter alia* that the evidentiary sources obtained from the voided search and from the wiretap were inextricably interwoven or intermingled; and where the State appellate courts in reviewing the suppression order have not ruled on the latter issue of intermingling, have agreed that the search was bad, but have held that the wiretap was lawful—does vindication of the Fourth Amendment rights acknowledgedly violated by the *search* require suppression also of the intermingled *wiretap*-obtained evidence, lest otherwise, in the particular circumstances presented, the Fourth Amendment rights be indirectly but effectively prejudiced?

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which at that time remained unmatured but are now believed to be mature for consideration by this Court in the instant proceeding. See Pet. Cert., pp. 2-3, 5-19, *Cohen* v. *New York*, Oct. Term 1963, No. 640, cited *supra*.

2. Assuming that the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a) which allows what we may term "searches" in the form of wiretaps upon a showing of "reasonable grounds" is not in conflict with any Federal constitutional or statutory provision, and treating the "reasonable grounds" provision of the State statute as equivalent to Fourth Amendment "probable cause" (evidently so construed by the State Courts), were the police affidavits used to obtain the ex parte wiretap order in this case adequate by Fourth Amendment standards in view of failure to establish reliability of the informer, among other Fourth Amendment defects?

3. If the wiretap affidavits be deemed to have met the test of "probable cause", then, reaching the question of constitutional validity of the statute, is the New York permissive wiretap statute (N.Y. Code Crim. Proc. §813-a) unconstitutional under the Fourth Amendment as authorizing a "general search" or search for "mere evidence" of crime (including "future crime") and not solely for fruits or instrumentalities of crime?

4. Can any State statutorily permitted wiretapping be constitutional under the Fourth and Fifth Amendments and 47 U.S.C. §605?

5. Did the overall conduct of the police in investigating the alleged abortion activities of petitioner—which police conduct included an egregiously high-handed and admittedly unconstitutional search, massive wiretapping for which ex parte State judicial permission was obtained on the basis of information from basely discreditable and favor-seeking-motivated informers whose information was moreover almost all hearsay, loss and spoliation of essential

records seized in the unlawful search, manifestly unconvincing police testimony at the suppression hearing to the effect that the wiretap rather than the search produced the essential leads for the abortion prosecution, and brutally coerced subjection of a main female prosecution witness to compulsory gynecological examination in the immediate aftermath of her alleged abortion by petitioner as she was arrested on leaving petitioner's office (the lady in question moreover having denied she was aborted and the hospital report being negative for abortion)—fall below Fourth and Fourteenth Amendment standards for the investigation and prosecution of crime?

Constitutional and Statutory Provisions Involved

The case involves Article VI (supremacy clause), and the Fourth (unreasonable search and seizure), Fifth (self-incrimination) and Fourteenth (due process of law) Amendments of the United States Constitution. It also involves §605 of the Federal Communications Act (U.S.C. Title 47). It also involves the following New York State statutes: Code Crim. Proc. §518-a, §§813-a, 813-c, 813-d and 813-e. These Federal and State statutory provisions are quoted in Appendix J hereto, *infra*.

Statement of the Case and of How the Federal Questions are Presented

Petitioner, a licensed physician of the State of New York, was indicted for abortion (R. 7-20).* He moved in the Supreme Court of New York, Kings County, to suppress

* "R. " refers to the printed Record On Appeal in the Court below, nine extra copies of which are filed herewith.

the use as evidence of products of a search of his home and office conducted during the middle of the night of September 2-3, 1960, and the products of a telephone wiretap of his office conducted for some months prior thereto under the authority of an ex parte Court order issued pursuant to N.Y. Code Crim. Proc. §813-a (R. 21). After extensive hearings (R. 63-556), the motion to suppress was granted, on the grounds *inter alia* that the search violated the Fourth Amendment, the wiretap permissive order was based on affidavits which were inadequate under the "reasonable grounds" requirement of the statute, and the evidentiary products (especially the names of female patients of petitioner) of the search and the wiretap were so inextricably intermingled or interwoven that it was necessary to suppress the use of the testimony of all of the female complaining witnesses named in the indictments; in this last connection the Supreme Court, Kings County (Rinaldi, J.), also noted that the police had lost, misplaced and destroyed records obtained in the search which were indispensable for determining which evidentiary sources came from the search and which from the wiretap, and it strongly disparaged the probativeness of the police testimony on this subject (R. 563-571; Appendix D hereto, *infra*).

The New York State statutes permit appeal by the State (the People) from an order of suppression of the instant type if the State files with the Appellate Court a statement asserting that, if the State is deprived of the use of the suppressed evidence, the prosecution cannot be carried forward to a conviction (N.Y. Code Crim. Proc. §518-a). The State filed such a statement in this case as a condition of the right to appeal to the Appellate Division, Second Department, Supreme Court of New York.

The Appellate Division, in the appeal by the State from the order of suppression, approved the lower Court's (Rinaldi, J.) invalidation of the search; it disapproved Justice Rinaldi's determination that the wiretap affidavits were insufficient; but, be it noted, this ruling of the Appellate Division was stated in only conclusory words; it deleted Justice Rinaldi's order of restraint or suppression as to the use of the names of the females mentioned in the indictments, but it did so without (so far as appears) considering the issue of whether those names came from the wiretap, or from the search, or interminglingly from both the wiretap and the search; it did not reach the issue of loss or spoliation of documents by the police; it also did not reach the issue of the overall police conduct in relation to the search and the wiretap taken together; and it did not reach any constitutional issue of wiretapping, i.e., either as regards the constitutionality of Code Crim. Proc. §813-a in itself, or as to the constitutionality of *any* form of State legislation for permissive wiretapping by ex parte Court order (R. 576-579; Appendix C hereto, *infra*).

Petitioner appealed, by leave, to the Court of Appeals of the State of New York (R. 573-575), from the order of the Appellate Division (R. 576-577). The Court of Appeals affirmed the order of the Appellate Division without opinion (Appendices A and B hereto, *infra*). Judge Fuld of the Court of Appeals dissented, in the following memorandum in which Chief Judge Desmond concurred (Appendix B hereto, *infra*):

> "I adhere to the views I expressed in People v. Dinan (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Commu-

nications Act and, accordingly, vote to reverse and to order a new trial."

The Federal questions were duly preserved by petitioner and, as seen from our recitals, *supra*, were necessarily passed upon or decided in each of the three State Courts below. The Federal Constitutional points urged by petitioner in the motion-to-suppress proceeding before the Supreme Court of New York, Kings County (Rinaldi, J.), are set forth in Appendix E hereto, *infra* (quoted from the "Summary of Defendant's Points" in the typewritten memorandum of law before the latter Court).

In the Appellate Division the within petitioner (as respondent or appellee in that appeal) urged the Federal Constitutional points which are set forth in Appendix F hereto, *infra* (taken from the printed "Respondent's Brief" in the Appellate Division).

The State (as appellant) urged in the Appellate Division the points set forth in Appendix G hereto, *infra* (quoted from the printed "Appellant's Brief" in the latter Court).

In petitioner's appeal to the Court of Appeals he urged the Federal Constitutional Points which are set forth in Appendix H hereto, *infra* (quoted from the printed "Appellant's Brief and Appendix" in the latter Court).

The State (as respondent or appellee) in the Court of Appeals urged the points which are set forth in Appendix I hereto, *infra* (quoted from the "Respondent's Brief" in the latter Court).

Reasons for Granting the Writ

I

All three of the Courts below were evidently in agreement that the search violated the Fourth Amendment. Since no guidance or expression was offered by the Appellate Division or by the Court of Appeals to deal with the problem of the express finding and ruling by the Supreme Court, Kings County, concerning the intermingled character of the evidentiary products of the search and the wiretap,* the modification on appeal which leaves the State free to use the evidence of the female complaining witnesses stands in this record not merely as a ruling by the State appellate courts below that the wiretap-obtained evidence may be used, but also it is susceptible of being applied (erroneously, we contend) as an effective ruling by the latter Courts that such wiretap evidence may be used irrespective of the consequences that this may work in the way of allowing use at the trial of concededly unconstitutionally obtained *search* evidence.

The exhaustive proceedings before the Supreme Court, Kings County, *in the hearing on the motion to* suppress, were so complete (R. 63-556) as to afford little if any realistic expectation that there will ever be judicially unraveled in this case the interweaving of the search-obtained evidence and evidentiary leads as distinct from those obtained through the wiretap.

This case presents, therefore, in an unusual (but likewise unusually compelling) way a problem as to the effec-

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* As noted, so far as appears the unconstitutional search was the source of the entirety of the evidentiary leads to the names of Dr. Cohen's female patients.

tive preservation of undisputedly applicable Fourth Amendment sanctions. By a process of amorphous absorption of the undisputedly unconstitutional search products into the allegedly legal wiretap products, the admittedly proper and necessary constitutional quarantine against the search products in this case is sure to be breached.

Nor is it to be thought that the present case may be rare or even unusual in these last mentioned respects. It is virtually standard operating procedure for police to follow up a wiretap or electronic eavesdrop with a search and seizure where prosecution is contemplated. The intriguing procedural device implicit in the not-too-coherent but impingingly predictable rulings of the State appellate courts in this case, a device whereby unconstitutional Fourth Amendment searches are to be "rehabilitated" by "constitutional" State wiretaps, should receive the attention of this Court, the present case being a suitable vehicle for this purpose through the granting of certiorari.

II

The Supreme Court, Kings County (Rinaldi, J.), specified in an impressively detailed manner (*infra*) the defectiveness of the wiretap affidavits under the Fourth Amendment test of "probable cause" * (R. 564-568; Appendix D hereto, *infra*). The Appellate Division ruled otherwise, but without any explanation or statement of reasons (R. 576-579; Appendix C hereto, *infra*); and the Court of Ap-

* The "reasonable grounds" provision of *N.Y. Code Crim. Proc.* §813-a is undisputedly the equivalent of "probable cause," and it has been so treated in this litigation. See also *People* v. *Grossman*, 45 Misc. 2d 557, 257 N.Y.S. 2d 266 (S. Ct. Kings Co. 1965). Cf. *Draper* v. *United States*, 358 U.S. 307, 310 fn. 1.

peals likewise (writing no opinion) did not explain why it affirmed the order of the Appellate Division (Appendices A and B hereto, *infra*).

The ex parte wiretap application and supporting affidavits appear at R. 21-29. The wiretap order was issued on affidavits by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. Let us begin by summarizing Justice Rinaldi's detailed analysis of those affidavits (it being remembered, again, that the Appellate Division and the Court of Appeals in reversing Justice Rinaldi on this issue gave no reasons for so doing).

Justice Rinaldi noted (R. 568) that Rosen and Saltzman were under investigation in connection with certain forgery, burglary and arson charges which in no way involved Dr. Cohen; that in the course of the investigation Rosen, "in an obvious attempt to curry favor with the police", volunteered to them that Dr. Cohen was committing abortions; that Rosen's information (described, *infra*) used in the supporting affidavits for the wiretap order resulted in supporting affidavits "based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto"; that "There is also a serious question" as to the sufficiency of the previous police dealings with Rosen such as would justify the police in depending upon the reliability of his information; that the question of informer reliability is "of paramount importance" and facts must be brought to the attention of the Court to whom ex parte application was made to satisfy it of such reliability; that Rosen and Saltzman "were themselves deeply enmeshed" in a major criminal ring and

while they had accurately confessed their own crimes and those of their accomplices in which they had already been implicated, they had never previously informed the police as to any crimes in which they themselves were not implicated; that "the police had no criteria to judge their reliability concerning information as to this defendant" and "Vouching as to their reliability had no basis in fact"; that the authorities impose "strict standards of reliability of informers"; that although these authorities involve search and seizure situations, "the same standards, at the least, must be applied to wiretap orders"; and that "The Court cannot find anything in the original wiretap affidavits which meet [sic] the foregoing tests as to * * * 'reasonable grounds' and 'reputation for reliability'"

The above summarized factual findings of Mr. Justice Rinaldi are fully supported by the record. Thus, the affidavits in support of the wiretap order revealed the following:—Assistant District Attorney McCabe's affidavit (R. 23-25) contains all of the allegedly material information, the affidavits of the informers Rosen and Saltzman being merely conclusory confirmations of Mr. McCabe's affidavit (R. 26-29), and stating that the information given by each of the informers to the police was their own "experience" and from conversation Saltzman allegedly had with one Irma Wertheimer. The McCabe affidavit averred that it was made *upon information and belief* and upon the annexed affidavits of Rosen and Saltzman, and that the sources of the information and the grounds of the belief were those "annexed affidavits, *the records and files of his office and information supplied to deponent by the detec-*

tive's squad attached to the office of the District Attorney, Kings County'' (Emphasis added).*

The ''information'' recited in the McCabe affidavit was that Irma Wertheimer in July or August of 1958, being pregnant, ''obtained information'' that a criminal abortion could be performed upon her by the within Dr. Cohen; that shortly thereafter she went to Dr. Cohen's office with her husband Milton Wertheimer and had an abortion done for $500; that in July or August of 1959 Irma Wertheimer, being again pregnant, this time from intercourse with her boyfriend Constantine Triges, she and Triges went to Dr. Cohen's office where they paid him $400. for performing an abortion; that again in October or November 1959 Irma and her boyfriend Triges went to Dr. Cohen's office where they paid him $400. for performing another abortion; that during the first week of February 1960 Audrey Saltzman, believing herself pregnant, consulted with her girlfriend Irma Wertheimer regarding Dr. Cohen, Audrey and Alvin G. Rosen went to Dr. Cohen's office, Rosen had $750. with him, Dr. Cohen examined Audrey and advised she was pregnant, he demanded $900. to perform an abortion, as Rosen only had $750. with him and as Dr. Cohen wanted the entire $900. they left his office with the intention of returning when they had the rest of the money, but thereafter Audrey's menstrual cycle came about naturally and they had no rea-

* Our italicized emphasis in the text immediately above is with a view to our discussion *infra* of one of the prime flaws in the wiretap affidavits, namely, that Mr. McCabe himself got his "information and belief" from police officers, not directly from any informant; see also our discussion *infra* as to the lack of any showing in this record that any affiant, informer or even any police officer was personally examined by the Judge who issued the original wiretap order.

son to return. Mr. McCabe's affidavit, which was sworn to July 27, 1960, concluded that by reason of the aforesaid there was "reasonable cause to believe that evidence of the crime of criminal abortion may be obtained if telephone messages were to be intercepted" on Dr. Cohen's office telephone. R. 23-25.

No affidavit was obtained from Irma or Milton Wertheimer, and the affidavits do not contain one word that the Wertheimer information was verified by anyone (R. 25-29).

The police testimony in the hearing before Justice Rinaldi revealed that the hearsay character of the affidavits was even more attenuated than appeared from the affidavits themselves because the police evidently got their whole story from Rosen rather than from his girlfriend Miss Saltzman, so that all of the alleged police information about Miss Saltzman's friend Irma Wertheimer (from whom no affidavit was obtained) came to them by *triple* hearsay (R. 119-132, 151-162, 241-247).

Indeed, since Assistant District Attorney McCabe in turn got his information from an unspecified police or detective source, or for all that appears, from *a chain* of such sources, the case is one of *at least quadruple* hearsay. The situation thus presented involves a hearsay attenuation too egregious to be salvageable under even the liberalized treatment of *United States* v. *Ventresca,* 380 U.S. 102, where the Court re-examined the problem of hearsay communications as among Government officers in conducting a search or in applying for a search warrant.

It is evident from the above why Justice Rinaldi concluded that the affidavits were insufficient. The affidavits contain nothing concerning the reliability of Rosen and

Saltzman as informers concerning abortion or any other criminal activity—and the record in this proceeding is barren of any indication that any further information on this subject beyond the affidavits themselves was supplied to the Judge who granted the application for the ex parte wiretap order. The affidavits also show on their face that all of the alleged information concerning Irma Wertheimer was hearsay to Rosen and Saltzman and at least double hearsay to the police and the District Attorney. And as for the item in the McCabe affidavit about Rosen's and Saltzman's own alleged visit to Dr. Cohen's office, this would scarcely rank as "reasonable grounds" since all that allegedly occurred was a conversation about an abortion, but no abortion.

Besides all of this, the alleged happenings mentioned in the McCabe affidavit long antedated the wiretap application, which was made at the end of July 1960. The alleged Irma Wertheimer incidents were in the summer of 1958, the summer of 1959 and the fall of 1959, and the inconclusive alleged Saltzman-Rosen incident was six months prior to the wiretap application.

We pause to emphasize this last noted circumstance that the alleged "reasonable grounds" adduced in Mr. McCabe's affidavit were so remotely prior in time to the wiretap application. As seen, Mr. Justice Rinaldi remarked that the application was based "on events which had transpired a long time prior thereto" (R. 568). The full implications of the constitutional offensiveness of this sort of inordinate time lag in applications for warrants which are in the nature of search warrants, can perhaps be best

appreciated in connection with our discussion *infra* of the problem of a search for "evidence", as distinct from a search for property. But it is pertinent also at this juncture to say a few additional words on this subject of the time lag in the present case. It is fundamental, in the general law of search warrants, that this kind of stale allegations cannot support an application for a search warrant. Cf. the Federal decisions which deal with this staleness factor in connection with arrests and searches, e.g., *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3 1958), cert. denied 358 U.S. 880; *Dailey* v. *United States*, 261 F. 2d 870 (C.A. 5 1958), cert. denied 359 U.S. 969; *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2 1961); *Hobson* v. *United States*, 226 F. 2d 890 (C.A. 8 1955); *Wrightson* v. *United States*, 222 F. 2d 556 (C.A.D.C. 1955); see also the dissenting opinion by Judge Waterman, collecting the authorities, in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2 1960), reversed on other grounds 369 U.S. 121.

Necessarily presented on this record also is the familiar Fourth Amendment point—prominently stressed by the New York Court of Appeals itself in its recent decision in *People* v. *McCall*, 17 N.Y. 2d 152—that no showing was made (before Justice Rinaldi) that any affiant or any other person appeared for examination before the Judge who granted the original wiretap order. Thus there was, apparently no opportunity, by judicial means, as contemplated by *N.Y. Code Crim. Proc.* §813a (and by the Fourth Amendment), to test the factual foundations of this manifestly shaky (at best) wiretap application. The order allowing the wiretap (R. 21) referred only to the "annexed affidavits", not to any examination or personal appearance of anyone. Had there been any such examination or appear-

ance it would presumably have become part of the record basis of the wiretap order, as the Court below pointed out in *McCall, supra.*

On this record, how can it be said that the State showed before the Judge who signed the wiretap order, that the police were in possession of the constitutionally required quality of "reliable" information to justify them in averring "that there is reasonable ground to believe that evidence of crime [abortion] may be * * * obtained" by the desired wiretap? It hardly seems necessary to re-emphasize the exacting standards in regard to adequate affidavit demonstration of the "reliability of the informer" at the time of the application for the "warrant". E.g., *Draper* v. *United States,* 358 U.S. 307; *Jones* v. *United States,* 362 U.S. 257; *Henry* v. *United States,* 361 U.S. 98.

Under the rule of these controlling Federal cases it was obligatory for the State here to demonstrate in the original wiretap affidavits the "reputation for reliability" of Alvin Rosen and Audrey Saltzman, and to include in those affidavits "some factual information independently corroborative" of the Rosen-Saltzman information (*United States* v. *Ramirez,* 279 F. 2d 712, 715 (C.A. 2, 1960)). Justice Rinaldi correctly concluded that he "cannot find anything in the original wiretap affidavits which meets the foregoing tests."

Certiorari is justified, indeed required, to bring about in this case, on the high authority of this Court, a re-assertion of the standards of the Fourth Amendment "probable cause" for "search" affidavits. *A fortiori* those standards are needed in connection with the form of "search" which is connoted by the peculiar "search" activities under State permissive wiretap legislation, as is the case here.

III

If the wiretap affidavits in the present case be deemed to have met the test of "probable cause", there is then necessarily reached the question of the validity of the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a).

But for the contrary conclusion of the Appellate Division and the Court of Appeals, it would have seemed unnecessary, in view of the utter insufficiency of the affidavits in point of their probative quality (hearsay and staleness) and their failure to establish reliability of informers, to discuss other legal insufficiencies of the affidavits. But as it is, there are additional points for discussion. Is the New York State eavesdrop statute (Code Crim. Proc. §813-a) unconstitutional as offending against the ban against "general searches," also termed "searches for mere evidence"? Applying such test of constitutionality to the facts of the case, do the affidavits show that what was contemplated was a search for "mere evidence"? Even if the statute is constitutional in allowing searches for "mere evidence", is there anything in the affidavits looking to discovery of "evidence" of any past-committed or currently-being-committed abortion as distinct from *future* crime?

There are two familiar broad categories of analytical disjunction in the general law of search and seizure which elucidate the above questions, namely, (1) the disjunction as between "past" *versus* "present" *versus* "future" crimes, and (2) the disjunction as between "fruits and instrumentalities" of crime *versus* "mere evidence" of crime. It is elementary that there can exist no "probable cause" to arrest or to search for mere "future" crimes,

and that the entire corpus of the law of "probable cause" does not go beyond "past" or "present" crimes. E.g., *Brinegar* v. *United States,* 338 U.S. 160, 175-176, where, in defining "probable cause", the Court spoke of knowledge and information "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense *has been* or is *being* committed" (emphasis supplied).

In other words, it is of the very essence of the constitutional law of unreasonable search and seizure, as such would sensibly apply to wiretap "searches," that wiretapping may constitutionally be permitted (if at all) only upon a showing which meets the tests of "probable cause" that a crime has been committed or is being committed.

Even so, however, the problem above suggested continues unresolved, *viz.,* that in regard to any such showing of a past-committed crime it is impossible to see how a wiretap could produce anything except supposedly confirmatory "evidence" of such alleged commission of the past crime; and this in turn means not only that there would have to be a showing of a reasonably grounded expectation that such confirmatory evidence would be obtained by wiretapping, but also it means that the problem heads one directly into the extremely disturbing constitutional question above mentioned as to whether *any* search *for mere evidence* (as distinct from fruits and instrumentalities of a crime) may be permitted. See Chief Judge Desmond's separate opinion in the recent *McCall* decision, *supra,* where the Chief Judge said:

> "* * * And there is another unanswerable constitutional objection to wire tapping and to the use of wire tapped evidence. Before the Fourth Amend-

> ment (see *Entick* v. *Carrington*, 1765, 19 Howell's State Trials 1029) it was the law, and it has always been the law under the Fourth Amendment (*Gouled* v. *United States*, 255 U.S. 298, 309; *Boyd* v. *United States*, *supra*) that even a search under a warrant is unlawful, 'if used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding,' and that no search is valid except for the seizure of specific property, not evidence. Wire tapping by its very nature can never be anything but a search for evidence. Our wire tapping statute (813-a Code Crim. Proc.) as well as Art. 1, Sec. 12 of the State Constitution specifically authorizes the tapping of telephones to obtain 'evidence of crime' and the very affidavits on which the wire tap orders in this case were granted allege that the wire tapping is to be done to obtain 'evidence of crime'. I cannot in conscience depart from the views which three of us expressed in dissent in *People* v. *Dinan*, 11 N.Y. 2d 357. All wiretapping violates both the Fourth and Fifth Amendments to the Federal Constitution."

The leading case which forbids a search for "mere evidence" is *Gouled* v. *United States*, 255 U.S. 298. See also the opinion of Mr. Justice Brennan, dissenting, in *Lopez* v. *United States*, 373 U.S. 427, where the authorities are collected and discussed.

If a search for "mere evidence" is unconstitutional, then it follows, for our case, that the provision in the eavesdrop statute (N.Y. Code Crime Proc. §813-a) permitting a wiretap upon "reasonable ground to believe that *evidence* of crime may thus be obtained" is unconstitutional if such

be construed to allow wiretapping for any purpose which would not be strictly analogous to a search for "fruits and instrumentalities" of the crime or crimes of the categories involved in the instant indictments.

Discussion of the problem of a "search for mere evidence" usually touches upon the Fifth Amendment (self-incrimination) as well as upon Fourth Amendment search and seizure. This was Chief Judge Desmond's conclusion in his separate opinion in *McCall*, quoted *supra*. The same unreasonable act of search which violates a citizen's right of privacy under the Fourth Amendment may and usually does simultaneously violate his privilege against self-incrimination under the Fifth Amendment.* *Boyd* v. *United States*, 116 U.S. 618; *Gouled* v. *United States*, 255 U.S. 298. See also, again, Mr. Justice Brennan's dissent in *Lopez* v. *United States*, 373 U.S. 427, bringing the discussion of this theme down to more recent date, and noting that the theme had been reaverred in *Mapp* v. *Ohio*, 367 U.S. 643.

It needs no extended argument to show that it is above all in the area of telephone wiretapping and other electronic eavesdropping that this interplay between unreasonable invasion of individual privacy and breach of the privilege against self-incrimination tends naturally to achieve its most vicious and intense form.

And this last, in turn, brings us finally to what is perhaps the profoundest constitutional infirmity in any system of court-permitted wiretapping or electronic eavesdropping.

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* *Malloy* v. *Hogan*, 378 U.S. 1, has made the law of Fifth Amendment self-incrimination applicable to the States.

We refer to the "general search" character which must inevitably attach to *any* act or situation of electronic eavesdropping. Unlike a search under a search warrant where the things to be seized are explicitly described (as required by the Constitution), the eavesdropping electronic device conveys to the recording instrument or to the human monitor-auditor everything that is said on the eavesdropped telephone or in the eavesdropped room space; plainly this amounts to a "general search" in the constitutionally forbidden sense.

Applying the above-described "mere evidence" tests to the within affidavits, we find that the Rosen-Saltzman information pertained to three alleged acts of abortion on Irma Wertheimer (all hearsay, as noted) and one inconclusive abortion interview, all had in the remote past. How could a *post-factum* wiretap of Dr. Cohen's telephone lead to "evidence" of such supposed past-committed abortion? This hoped-for wiretap result could come about only if the informer-affiants swore that he, or she (or both of them), were expecting to be in telephone communication with Dr. Cohen or his office in connection with some aftermath developments relating to some alleged past-committed abortion. No such indispensable averment was made in the papers filed with the application for the ex parte wiretap order.

It is indisputable then, again, that no affidavit showing was here made to justify the conclusion that "evidence" of alleged past-committed or present acts of abortion would be obtained. And a mere showing of a supposed past-committed abortion, especially abortions that are remote in relation to the time of application for a wire-tap order, would not in itself constitutionally justify the conclusion

that "evidence" of such past, or present, much less *future*, abortion activity would be turned up by a wiretap.*

IV

The dissenting opinion in this case written by Judge Fuld of the Court of Appeals, concurred in by Chief Judge Desmond, favored a disposition on the basis of outright constitutional invalidation of all State wiretapping in obedience to §605 of the Federal Communications Act (47 U.S.C.). In view of this Court's own continuing alertness to the problem of the conflict between cases such as *People* v. *Dinan*, 11 N.Y. 2d 350 and *Benanti* v. *United States*, 355 U.S. 96—see also the granting of certiorari in *Osborn* v. *United States*, 382 U.S. 1023, 15 L. Ed. 2d 538—we shall refrain from burdening the Court with further argument in support of the suggestion that this case affords a proper occasion for re-examining the Federal constitutionality of State wiretapping under the tests of the Fourth Amendment and of §605 of the Communications Act (supremacy clause).

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* We respectfully suggest that *Gouled* v. *United States*, 255 U.S. 298, the leading authority on the "mere evidence" issue, is still the law, notwithstanding the scholarly ratiocinations in the recent New Jersey and California decisions—*State* v. *Bisaccia*, 45 N.J. 504, 213 A. 2d 185; *People* v. *Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108—which came to this Court's attention in *Schmerber* v. *California*, —— U.S. ——, 16 L. Ed. 2d 908, 918 fn. 10, and which doubtless also were before Chief Judge Desmond and Judge Fuld (the dissenting Judges in the Court below in the instant case) when they dissented in another case decided on the same day as the instant case, *People* v. *Berger*, 18 N.Y. 2d 638, 640, involving the room "bugging" type of electronic eavesdropping (we are advised that the latter *Berger* case is about to be presented to this Court by petition for certiorari).

V

The judgment below should be reviewed in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far below the Fourth Amendment and due process standards established by this Court under the test of "the total atmosphere of the case." *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (Frankfurter, J., dissenting). See also *Rios* v. *United States*, 364 U.S. 253, 255 ("a particular evaluation of the conduct of the officers involved").

The Court customarily examines the record facts in search-and-seizure cases in this comprehensive manner. *E.g., Henry* v. *United States*, 361 U.S. 98; *Jones* v. *United States*, 362 U.S. 257; *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344.

Let us note the several ways in which the conduct of the police officers in this case violated the above standards:

Spoliation of Evidence and Improper Keeping of Records

(1) Perhaps the most notable instance in the epidemic of "loss", "misplacement" or destruction of documentary evidence on the part of the police in this case is that of Dr. Cohen's office desk diary calendar. Detective Toolan, describing the search activities at Dr. Cohen's office on the night of September 2-3, 1960 said that Policewoman O'Meara examined the calendar or diary on Dr. Cohen's desk and that she "found a name that meant something to her from her investigation up to that point, and she took that with her" (R. 117); also that "during the course of

the entire time that we were in the doctor's office, Gloria O'Meara was behind the desk and she was looking through patients' cards and through that calendar diary that I referred to" (R. 118). Chief Policewoman Melchionne said "I have heard that they did take a diary and that same has been unavailable at this point", "misplaced" (R. 171). Toolan also said that he does not know where the calendar diary is now (R. 148). Policewoman Munroe testified that Miss O'Meara told her she had looked at the calendar diary in Dr. Cohen's office during the search (R. 351).

Miss O'Meara herself stated that this calendar had been missing since sometime in 1961 (R. 393), she had taken it to Assistant District Attorney Panzarella (R. 395), after that she had seen it around for several months but she had since searched for it and could not find it (R. 395-396).

The People attempted, through the testimony of Miss O'Meara, to "rehabilitate" this missing calendar or diary by low-quality secondary "evidence" of Miss O'Meara's verbally stated "recollections" of the contents of the diary and by her alleged notes (as to which see further *infra*), to all of which a defense objection was sustained (R. 393-396). The admission by Miss O'Meara that the name of at least one complainant was found in the diary highlights its importance and the undoubted use of the diary in the investigation of Dr. Cohen after his arrest which led to the indictments herein. As a matter of fact, the District Attorney offered to concede that all of the police efforts, including the wiretapping, led to only one complainant, Esther Richards (R. 337-338). Since the diary was the only record taken from the defendant's office despite the examination of the patients' index cards as well, the infer-

ence from this theory of the District Attorney is overpowering that the diary was not only useful to the police but also, that the diary supplied the leads to the other complainants. Furthermore, Miss O'Meara destroyed relevant notes relating to her examination of the diary and the patients' index cards (R. 487, 489, 495-496).

In *Campbell* v. *United States,* 373 U.S. 487, and in the earlier decision in the same case in 365 U.S. 85, the Court indicated that in a proper case attention must be given to the question of what sanctions would be appropriate against the Government if it developed that "Jencks Act" (18 U.S.C. §3500) notes which were producible had been destroyed and no copy had survived. The Court also intimated that the sanctions in such a situation would be those under sub-section "d" of the Jencks Act, which provides, *inter alia,* that "The Court shall strike from the record the testimony of the witness" as to whom a producible statement is not delivered to the defendant. The *Campbell* cases, *supra,* have even left open the question of applying such sanctions against the Government where the destruction of the document involved may have been done in good faith. As noted by Circuit Judge Aldrich in his concurring opinion in *Campbell* v. *United States,* 303 F. 2d 747, 751 (C.A. 1 1962), " * * * the Supreme Court indicated the possibility of consequences unfavorable to the Government even if the destruction were innocent." The Courts of New York State have adopted the "Jencks" policy (*People* v. *Rosario,* 9 N.Y. 2d 286; *People* v. *Agron,* 10 N.Y. 2d 130), but they have not applied that policy here.

The New York Courts also recognize the need to afford some appropriate remedy to a party whose property seized

in an illegal search has been destroyed. *Metallic Flowers* v. *City of New York*, 4 A.D. 2d 292, 164 N.Y.S. 2d 227, 234 (1st Dept. 1957), mentioning as among the available remedies replevin and an action for damages. Obviously these latter suggested remedies were not adequate in our case. See also *People* v. *Strollo*, 191 N.Y. 42 (1908); *People* v. *Bell*, 21 A.D. 2d 660 (1964); *People* v. *Genova*, 15 A.D. 2d 44 (1961), where the loss of trial exhibits by the People which are essential for appellate review requires reversal of a conviction and dismissal of the charges against the defendant. How much more aggrieving is the loss of essential documentary items *before trial!*

Further analogous light is shed on the instant situation by the familiar authorities which require the vitiating of a conviction in a criminal case when evidence has been suppressed by the prosecution. *E.g.*, *Brady* v. *Maryland*, 373 U.S. 83.

That the precise issue here presented in regard to the loss or destruction of petitioner's office calendar or diary does not appear to have arisen in any previous proceeding for suppression of illegally seized evidence, should not result in depriving petitioner of a remedy. The granting of our motion to suppress by Justice Rinaldi was justified on the ground, without more, of the People's negligent or otherwise improper conduct in losing Dr. Cohen's office calendar or diary. Such was entirely in keeping with the spirit of the Fourth Amendment tests above mentioned whereby the Courts are called upon to consider "the total atmosphere of the case" and to make a "particularized evaluation of the conduct of the officers involved." The unavailability of the calendar or diary and the destruction

of notes relating to the other facets of the search (i.e., patients' index cards), when taken together with the numerous and important other instances of unfairness and violation of due process on the part of the People's officers in this case, required the granting of our motion to suppress as a means of vindicating the Fourth Amendment standards just mentioned.

(2) Rivalling the "lost" diary item is Policewoman O'Meara's astounding "dot-dash" testimony (i.e., coded notes containing "dot" and "dash" symbols) (R. 477-480), and the manner in which she prepared her notes of the search and the alleged prior surveillance of the defendant's office (R. 845 et seq.). In this branch of the case, the witness' tactical preoccupation seemed to be, at the moment, not to shield what had happened prior to September 2, 1960,* but to shield what happened on and after those days. Miss O'Meara's "dots" were supposed to indicate that a name on her pre-search list was found on a patient's index card or in the diary in defendant's office; a "dash" was supposed to indicate that the particular name on the pre-search list did not appear on such an index card or in the diary (R. 478). What is interesting, therefore, is that in only one instance covered by the questioning on this subject did Miss O'Meara's supposed system of dots and dashes produce an unequivocal or even a coherent conclusion, and in that single instance the name (Basile) is not important for this case (R. 479). Thus, of the names concerning which she testified on her pre-search list, the name Albertino had a dash and an allegedly accidental or inadvertent dot that "looked" to the witness like merely the dotting of the letter "i" (R. 478); the names Holman, Pack and Richards each had both a dot and a dash, of which the witness said (sud-

* The date of the search.

denly amending the supposed meaning of her supposed code) that this meant no index card was found for these names on the pre-search list (R. 478-479).

It is plain to see what this testimony of Miss O'Meara concerning the "dot-and-dash" code and the notes of surveillance was designed to accomplish. Its purpose was to suggest that no information which led to the within indictments was obtained from the patients' index cards or the "lost" diary during the search of September 2-3, 1960.

(3) Other instances of destruction, loss, misplacement or failure to keep records relevant to the issues of the motion to suppress are: (a) Policewoman O'Meara's admitted, unexplained and unexcused destruction of several pages from her memorandum book relating to the crucial happenings of September 2, 1960 (R. 485-489); (b) Miss O'Meara's similar destruction or misplacement of other contemporaneous notes concerning the events of the afternoon of September 2, 1960 which had allegedly been used by her to write up her memorandum book of a subsequent date (R. 489-491); (c) Miss O'Meara's similar admitted destruction of an unknown number of other relevant notes and papers (R. 508-509); (d) the admitted destruction by Detective Malapero of the paper on which he allegedly wrote down the license plate number of the Esther Richards automobile on September 2, 1960 (R. 223-225); (e) the failure of Detectives Toolan and Malapero to have kept any notes or memoranda at all, under direct orders of the District Attorney's office that such omission to keep records should be deliberately done in this case despite police regulations which require the keeping of such notes and memoranda (R. 111, 132-133, 165, 223-225); (f) the admitted

failure of Chief Policewoman Melchionne to make or keep any notes or memoranda concerning this investigation or, especially, concerning her vital conversations with Detective Toolan, despite her testimony that she had not been instructed by the District Attorney not to keep notes or memoranda about this case (R. 178, 211-212)*; (g) the failure of Policewoman Munroe to make or keep any notes or memoranda except those consisting of her typewritten transcripts and lists in regard to the wiretap, despite the testimony of Mrs. Melchionne that her policewomen had not been instructed not to keep notes or memoranda about this case and her testimony that her policewomen did keep their own notes and that she assumes they still have them (R. 178-179, 291, 293-294); (h) the absence from Miss O'Meara's allegedly very complete notes concerning the arrest, of any mention of the defendant's alleged invitation to the police to search his office (R. 498-500).

It is remarkable, in fact uncanny, how the instances throughout this case in which records are missing or claimedly were never made, as well as the instances in which the police notes or the police memories are deficient or flawed and the police veracity questionable, happened to touch the most sensitive areas of the case, *viz.*, the areas which would reveal illegal wiretap-obtained leads or illegal search-obtained leads, and would refute claimed legal evidentiary leads. The police reports which tended to be most "available" were those relating to alleged "surveillance" activities, and those least available related to the wiretap and the

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* Note the inconsistency as between the Toolan-Malapero testimony and the Melchionne testimony concerning alleged instructions from the District Attorney as to the keeping of notes and memoranda.

search. Most striking, of course, was, again, the marvelous condition of the notes and records of Miss O'Meara, which were helpfully "complete" on points desired by the prosecution and "missing" or incomprehensibly unclear on points desired by the defense.

The combination of all of the above improprieties, deficiencies and official neglects on the part of the People's officers in this case is an important factor, we submit, to be considered in applying the tests of "the total atmosphere of the case" in regard to Fourth Amendment reasonableness (*Rabinowitz, supra*), and of "a particularized evaluation of the conduct of the officers involved" (*Rios, supra*).

The Extraordinary Conduct of the Police In Extracting Alleged Admissions From The Complainant Esther Richards.

In point of sheer luridness in the "total atmosphere of the case," if not of constitutionally prejudicial immediacy and directness of impact upon the petitioner Dr. Cohen himself, the following is perhaps the single most climactic item in this case:

Policewoman Munroe testified that she and Officer Toolan "intercepted" Esther Richards in an automobile on a street in Brooklyn on September 2, 1960, that this woman was subjected to repeated and prolonged interrogation while thus held in police custody, that she was taken to Kings County Hospital, *after her denial that she had been aborted,* and there subjected to a gynecological examination which the hospital doctor found to be *negative for abortion* (R. 278, 282, 327-331), that she was thereafter further interrogated, and was finally taken to the District

Attorney's office for still more interrogation, all of which is alleged to have culminated, after further alleged denials by her, in an admission of an abortion committed by the petitioner (R. 328-330).*

Unless Esther Richards consented to these phenomenal impositions by the police officers—there being nothing in the record to support any such suggestion of consent or waiver (indeed, Miss Richards for a long time denied she was aborted)—it is beyond any need for argument or citation of authority that she was subjected to unlawful arrest and to a barbarously unconstitutional search of her person in the most odiously intimate form imaginable. Cf. *Rochin* v. *California*, 342 U.S. 165, annotated in 96 L. ed. 194 (*"Physical Examination or Exhibition of, or Tests upon, a Suspect or Accused, as Violating Rights Guaranteed by Federal Constitution"*). Esther Richards herself, then, in a proper proceeding would undoubtedly be entitled to suppression of any alleged admission thus extracted from her. It follows also, therefore, incidentally, that the alleged evidence thus secured from Esther Richards was "illegal" in the literal and immediate sense of §249 of New York's own Code of Criminal Procedure ("The Grand Jury can receive none but legal evidence"). *Indeed, by virtue of this latter New York State Statute, the petitioner herein had literal "standing" to object to the Esther Richards item* (and he so urged in the courts below—e.g., "Appellant's Brief" in the Court of Appeals, p. 73).

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* We may note here that Miss Munroe had no notes of her alleged conversations with Esther Richards (R. 331), this being one more instance of the seemingly convenient unavailability of police notes and memoranda in this case.

In these circumstances, we submit that the usual limitations of "standing" to object to the use of evidence illegally seized from another person (*Jones* v. *United States,* 362 U.S. 257) do not apply, that the petitioner herein had such "standing" to move to suppress the alleged Esther Richards admission, whether or not such alleged admissions was introduced in evidence before the Grand Jury, and that in any event the facts should be taken into account in evaluating the "total atmosphere of the case".

The wrong of the police barbarity here involved cries out for judicial redress of the derivative wrong done to the present petitioner. The issue is one that goes beyond the law of search-and-seizure; it is an issue of constitutional due process because it involves police "conduct that shocks the conscience" and brings into operation the principle "that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin* v. *California, supra,* at 342 U.S. 172, 173.

In *Wong Sun* v. *United States,* 371 U.S. 471, the Court disapproved the use against one person of inculpatory admissions by another person where the latter admissions were obtained in violation of the Fourth Amendment. This ruling in *Wong Sun* is analogously applicable here.

We respectfully submit that the Esther Richards "search" episode impurified so fatally the "total atmosphere of the case" and required so unfavorabble an "evaluation of the conduct of the officers involved" as to have justified on this ground alone the granting of the within motion to suppress in its entirety in order to vindicate the requirements of Fourth Amendment reasonableness.

Further Remarks As To The Relationship Between The Wiretap And The Search.

As noted, the Appellate Courts below did not rule on any of the above described issues as to the overall police conduct, the spoliation or loss of documents and reports, the police brutality towards Esther Richards, or as to any of the grave problems concerning the integral relationship between the wiretap and the search.

It is impossible to see how the Appellate rulings below that the testimony of the females named in the indictment is usable at the trial, can be urged as meaning that the Appellate Courts below "held" that the police got the names of those women from the wiretap rather than from the search. The Courts below did not have before them the wiretap, or any stenographic transcripts thereof, or Dr. Cohen's "lost" diary; and, as seen, Justice Rinaldi found that the names came either from the search or the wiretap and search together.

The Appellate rulings below also present these further anomalies: How could the arrest on September 2-3 be invalid (as the Appellate Division, affirmed without opinion by the Court of Appeals, held it was) if the antecedent wiretaps were valid (as the Appellate Division, again affirmed by the Court of Appeals, also held), i.e., how could the arrest be invalid since it was undisputably based on the alleged Esther Richards happening, and that episode was unquestionably generated by the wiretap which the Appellate Courts below have held valid? And how, furthermore, could the Appellate Division (and the Court of Appeals) approve the order for return of the property seized at the time of arrest in petitioner's home if the ar-

rest was thus generated by wiretap information which, again, the Appellate Division (and the Court of Appeals) found to be legally obtained!

These peculiarities in the structure of the Appellate rulings below require at the very least that—in the event that this Court too should decline to undertake review of the constitutionality of the wiretaps or should uphold their constitutionality—that certiorari should be granted to direct that the matter be remanded for further proceedings to make definitive factual findings as to whether the names of the females came from the search or the wiretap.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner
Carl I. Cohen

EUGENE GOLD
Of Counsel

[Appendices follow]

APPENDIX A

Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

REMITTITUR July 7, 1966

FILED Jul 20 1966

2. No. 223 66

THE PEOPLE &c.,
Respondent,

vs.

CARL I. COHEN,
Appellant.

Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and sixty-six, Carl I. Cohen, the appellant—in this cause, came here unto the Court of Appeals, by Kleinman; Gold & Landsman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Eugene Gold, of counsel for the appellant—, and by Mr. William I. Siegel, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellat Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said

Appendix A—Remittitur (Order of Affirmance) of the Court of Appeals of the State of New York

Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 7, 1966.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

APPENDIX B

"Memorandum," Report of Decision of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CARL I. COHEN, Appellant.

Argued June 2, 1966; decided July 7, 1966.

Crimes—wiretapping—Supreme Court vacated and set aside order authorizing telephone wiretapping of defendant's office telephone, restrained use at defendant's trial of any conversations obtained as result of wiretapping pursuant to said order and any leads, clues and information obtained as result of use of said wiretapping, restrained use at trial of any articles of evidence seized or examined in search of defendant's home and office and any leads, clues and information obtained as result of use of said articles, and also restrained use at trial of testimony of female persons named in specified indictments—Appellate Division modified, agreeing that evidence seized in search had been properly suppressed, but finding that order authorizing wiretapping had been based on sufficient affidavits —order of Appellate Division affirmed.

People v. *Cohen*, 24 A D 2d 900, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 29, 1965, which modified and, as modified, affirmed an order of the Supreme Court (DOMINIC S. RINALDI, J.;

opinion 42 Misc 2d 403), entered in Kings County, which, upon motion by defendant, (1) vacated and set aside an ex parte order issued on July 28, 1960 by a Supreme Court Justice authorizing telephone wiretapping of defendant's office telephone, (2) restrained and precluded the District Attorney of Kings County and all police officers of the City of New York from using upon defendant's trial (a) any and all articles of evidence seized or examined by police officers in defendant's home and office on September 2 and 3, 1960 and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of said articles of evidence, (b) any and all telephone conversations obtained as a result of telephone wiretapping of defendant's office telephone pursuant to the ex parte order of July 28, 1960 and any and all leads and clues and any information obtained as a result of the use of said wiretapping and (c) the testimony of the female persons named in five specified indictments, and (3) directed the return to defendant of all the property seized from his person and office on September 2 and 3, 1960 and any and all photographs, copies, notes or memoranda of the articles seized or examined. The modification consisted of deleting the paragraphs which vacated and set aside the ex parte order of July 28, 1960 and which restrained and precluded from use upon defendant's trial the telephone conversations and the leads, clues and information obtained as a result of the wiretapping pursuant to said order and the testimony of the female persons named in the specified indict-

ments. The Appellate Division found that the denial of a prior motion by defendant to vacate the ex parte order of July 28, 1960 (see 41 Misc 2d 158) had not been on the merits and, accordingly, did not bar the present litigation; that the affidavits in support of the People's motion for the order authorizing the wiretapping (see 42 Misc 2d 403, 406) were sufficient, but that the search had been conducted without defendant's consent and without a warrant and had not been incidental to a lawful arrest and that, accordingly, evidence seized during it had properly been suppressed. In the Court of Appeals defendant argued, in part, that the affidavits upon which the order authorizing the wiretapping was issued were insufficient and failed to show "reasonable ground to believe that evidence of crime" might be obtained, as required by section 813-a of the Code of Criminal Procedure; that said section was unconstitutional as applied to the present case; that all evidence obtained or derived directly or indirectly from the wiretapping should be excluded as violative of Federal constitutional and statutory prohibitions, and that the wiretapping was inextricably interwoven with the unconstitutional search of September 2-3, 1960.

Eugene Gold for appellant.

Aaron E. Koota, District Attorney (*William I. Siegel* of counsel), for respondent.

Order affirmed; no opinion.

Appendix B—"Memorandum" Report of Decision of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

Concur: Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING. Judge FULD dissents in the following memorandum in which Chief Judge DESMOND concurs: I adhere to the views I expressed in *People* v. *Dinan* (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act, and, accordingly, vote to reverse and to order a new trial.

APPENDIX C

Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

In a criminal action, the People appeal from an order of the Supreme Court, Kings County, entered March 13, 1964 after a hearing, which (a) granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as a result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom. The People have filed the statement required by statute (Code Crim. Pro., § 518-a) in order to perfect the appeal from the said order.

Order modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as hereafter indicated) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs. Order, as so modified, affirmed.

The defendant, a physician, was charged in five indictments with nine counts alleging the commission of criminal abortions and with one count charging the crime of attempted abortion. His motion to suppress the fruits of a search of his office and to preclude the use of leads obtained through the use of a wiretap on his office telephone was granted (42 Misc 2d 403) after his prior motion to vacate and set aside the original *ex parte* wiretap order had been denied (41 Misc 2d 158).

Appendix C—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

The denial of defendant's motion to vacate and set aside the original order authorizing the wiretap did not reach the question of the validity of said order. The motion was denied on a finding that the moving papers in support of the motion to vacate were insufficient. Since the merits of the order were not reached, the ultimate holding does not bar a relitigation of the matters not specifically passed upon (Eagle Lion Studios v. Loews, 248 F. 2d 438, 444, affd. 358 U.S. 100; Southern Pac. R. Co. v. United States, 168 U.S. 1; St. Joseph Union Depot Co. v. Chicago R.I. & P. Ry. Co. 89 Fed. 648; cert. den. 172 U.S. 649; Schneider v. Schneider, 281 App. Div. 250).

The original wiretap order was a proper subject of judicial review in the same manner and to the limited extent permitted with respect to a warrant for search and seizure

We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were suffiicent.

The finding that defendant did not consent to a search of his office is supported by the evidence. Since there was no warrant and the search was not conducted incidental to a lawful arrest, the evidence seized was properly suppressed.

BELDOCK, *P.J.*, CHRIST, HILL, RABIN and BENJAMIN, *JJ.*, concur.

APPENDIX D

Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

People, & C. v. Carl I. Cohen—The defendant is a physician who is charged with abortion under indictments returned in November, 1960. He now moves under Code of Criminal Procedure, sections 813-c, et seq., to suppress evidence obtained by telephone wiretapping and by a search of his private office. The defendant's private office telephone was tapped by police officers from July 29 to September 2, 1960, pursuant to an ex parte order issued on July 28, 1960. It is conceded by the People that the information obtained from such wiretaps resulted in the leads which culminated in the defendant's arrest for abortion at his home on the night of September 2-3, 1960. At that time, a search was also made at his home and office. The arrest and search was made without a warrant.

This court conducted an extensive evidentiary hearing on the motion to suppress. There was made available to the court, in camera, the affidavits which were presented in support of the application for the ex parte wiretap order, as well as other information.

There can be no serious dispute that pertinent New York statutes contemplate and authorize a review of wiretap orders. Code of Criminal Procedure, section 813-a, authorizing ex parte wiretap orders, itself contemplates, by its incorporation of the constitutional standard "reasonable ground" (which is equivalent to "probable cause"), and by requiring preservation of the papers, that the matter shall be subject to judicial review when necessary. Code of Criminal Procedure secs. 813-c et seq., re motions

to suppress evidence, must be read in the light of the virtually identical Federal motion procedure after which it is obviously patterned. That Federal procedure, it is settled, includes motions to suppress wiretap evidence. New York's new motion procedure (secs. 813-c et seq.) was adopted with the expressly declared legislative purpose of bringing this state into compliance with Federal constitutional search-and-seizure requirements under the Mapp case (367 U. S. 643).

CPLR, section 4506 (formerly C. P. A. sec. 345[a]), also adopted in an express effort by the legislature to meet Federal standards, make inadmissible in criminal prosecutions evidence and evidentiary leads obtained by illegal wiretapping. Therefore, when, as here, a defendant in a criminal prosecution invokes the new motion to suppress procedure in aid of his rights under the new CPLR section 4506, it is impossible to see how the court can avoid the duty of determining whether a claimedly legal telephone wiretap, assertedly authorized under this State's permissive ex parte wiretap legislation above cited, was in fact legally authorized or not under the statutory standards of said permissive procedure. The court is aware of the contention of the People that a prior proceeding which was commenced before Mr. Justice Arkwright who denied the motion to vacate the wiretap order is now a bar to the instant motion (People v. Cohen, 41 Misc. 2d 158). The court finds that such proceeding does not affect its right to pass upon the validity of the wiretap order. Such prior proceeding did not avail itself of the processes of the Code of Criminal Procedure, section 813-c et seq. and in any event

never reached the merits of the issue as to the validity of such order. Mr. Justice Arkwright in his opinion denying the application before him clearly stated, and this court is in complete agreement, that our courts have the inherent power to reconsider the issuance of a wiretap order if perjury or error be shown in the original supporting affidavits or for any other cogent reason. Since the defendant at that time could only furnish limited information to him, his denial was solely on procedural grounds. The appeal from his order was dismissed by the Appellate Division, Second Department (N. Y. L. J., April 18, 1963, p. 16), and leave to appeal to the Court of Appeals was denied on July 10, 1963, by Fuld, J., and the court en banc (13 N. Y. 2d 595).

That being the case, this court deems itself under a duty to consider the issues raised by this motion on the merits. In order to do so, it must determine whether the "reasonable ground" requirement of the Code of Criminal Procedure, section 813-a, was satisfied in the issuance of the wiretap order.

The order was issued on July 28, 1960, by a former justice of this court on the supporting affidavits of Kenneth J. McCabe, chief assistant of the district attorney, now deceased, Alvin G. Rosen and his "girl friend" Audrey Salzman. These two persons were the subject of an investigation by the district attorney in crimes involving forgery, burglary and arson, none of which concerned the defendant in this case, in which it was claimed they had participated. During the course of such investigation, Rosen, in an obvious attempt to curry favor with the police, volunteered

information that the defendant was conducting an "Abortion Mill." The information which he furnished to the police and which was incorporated into the supporting affidavits was as follows: That Rosen and his "girl friend" had at one time visited the defendant to arrange for her abortion; that they could not agree on price; that they left and did not return because she later discovered that she was not pregnant; that a friend of the "girl friend" had once been aborted by the doctor in July or August of 1958 and subsequently again a year later and also in October or November of 1959. Rosen stated and it was so set forth in the supporting affidavits that he had obtained this information from his "girl friend" who in turn had learned of this from her friend. No supporting affidavit was obtained from the "prolific" friend. Thus supporting affidavits based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto, became the basis for the issuance of the wiretap order. There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend upon the reliability of their information. In any event, the police testified that they proceeded to "tap" the office telephone of the defendant and as leads were obtained, they questioned certain females who were observed leaving his office and obtained statements from them which led to the eventual arrest and indictment of this defendant.

In the light of the foregoing, was there "reasonable ground" to believe that "evidence of crime may thus be

obtained'' in order to comply with the statutory requirement under section 813-a?

It is elementary that there can exist no ''probable cause'' to search for mere ''future'' crimes and case law as to ''probable cause'' is concerned with ''past'' or ''present'' crimes (Brinegar v. United States, 338 U. S. 160). At the most therefore, wiretapping may only be permitted upon a showing which meets the tests of ''probable cause'' that a crime has been or is being committed. Under our law as it is presently constituted, law enforcement officers are on the horns of a dilemma. Wiretapping is a crime under federal statutes but is permissible in our state if made with the sanction of a court order. And yet, if such sanction is obtained and ''taps'' made, the question presents itself whether those officers connected with such wiretapping may not be prosecuted for the violation of a federal statute. Wiretap orders are therefore issued with great reluctance and it has become the common practice to avoid issuance if other means are available to law enforcement agencies to obtain the required results.

The reliability of the informers in order for the issuing court to determine for itself ''reasonable grounds'' or ''probable cause'' becomes of paramount importance. If the police vouch for such reliability facts must be stated and brought to the attention of the court to satisfy it that such is the case. The informers, Alvin Rosen and Audrey Salzman at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers. It is true that they ''accurately'' confessed

their own misdeeds and those of their accomplices in which they had already been implicated. They, at no time, however, previously informed the police as to crimes in which they themselves were not implicated. On that basis, the police had no criteria to judge their reliability concerning information as to this defendant. Vouching as to their reliability had no basis in fact, "* * * the affiant must * * * demonstrate that the informant has established a reputation for reliability so as to be worthy of belief" (United States v. Ramirez, 279 F. 2d 712, 715, C. A. 2, 1960).

Judge Sobel of this court, in his recent Law Journal articles (October 29, 1963) referred to "the rather strict standards of reliability of informers" citing the leading cases of Draper v. United States (358 U. S. 307), Jones v. United States (362 U. S. 257), Henry v. United States (361 U. S. 98). One of our leading cases, People v. Coffey (12 N. Y. 2d 443), along the same lines specifies that "simple, untested rumor is not ground enough nor * * * is untested information from a person of no established reliabilty, or suspicion alone. Substantiation of information can come either from the informer's own character and reputation or from the separate objective checking of the tale he tells." Although these decisions and a multitude of others in the same vein, involved search and seizure, the same standards, at the least, must be applied to wiretap orders. Both types of order are obtained ex parte. However, execution of the search warrant necessarily reveals its issuance and objectives. The same may not be said of wiretap orders which are carried out surreptitiously except in those rare in-

stances where the object of the wiretap learns of it through accident. It would not be amiss for the court to state that, if at all, the standards to test the advisability of issuing a wiretap order should be much more stringent than those applied to search warrants.

The court cannot find anything in the original wiretap affidavits which meet the foregoing tests as to statutory requirements of "reasonable grounds" and "reputation for reliability." It must therefore conclude that the wiretap order was issued contrary to statutory and settled law and the said order is hereby vacated.

The wiretapping activity from July 29 to September 2, 1962, being thus determined to have been illegal in toto, all evidence and all evidentiary leads obtained or derived from the wiretap, and all evidence obtained or derived from such leads, are hereby ordered suppressed and inadmissible pursuant to CPLR, section 4506. In order that there be no doubt as to this, the court finds, from the testimony at the hearing herein, and from the reasonable inferences based on the aforesaid, that the People obtained from the wiretaps, in the case of each of the females, whose alleged abortions are the subject of the indictments, the original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based.

The court finds further, and in conjunction with the findings above stated, that the People's claim that the original information or leads referred to in said above findings were obtained from surveillance or other police activity not inclusive of wiretapping, is not supported by any evidence

other than purely conclusory assertions of the police witnesses. The latter witnesses not having testified concerning any details or concrete circumstances whatever to support such conclusory claims of surveillance results, &c., and the evidence that the original information or leads came from wiretapping being strong and convincing, this conclusory contention of the People is hereby found not to have been established.

The court further finds that the list of names of females which Policewoman O'Meara brought with her to the defendant's office on the night of September 2-3, 1960, for the purpose of checking said list against defendant's private office records, consisted either of names obtained exclusively in the first instance from the wiretaps, or of names obtained by means so inextricably connected with the wiretaps as to be required to be deemed a product thereof as a matter of law and for the purposes of the instant proceeding. The only inference permitted by the testimony and by the other records of this proceeding is that the aforesaid list of names was in itself in fact either a sole product of the wiretap, or a joint product of the wiretap plus the defendant's office records (especially the lost diary or desk calendar as to which see further infra); or was the sole produce of said office records, and that said list to the extent that it was the product of said office records was made up during or after the search of the night of September 2-3, 1960, rather than being in existence prior thereto as claimed by the People.

The People admit, and the court finds that during the search of September 2-3, 1960, the People seized a diary

or desk calendar from the defendant's private office, and that said diary or calendar subsequently disappeared while in the custody of the People.

The People also admit, and the court finds that during the search of the night of September 2-3, 1960, the People made a detailed examination of the file of patients' index cards in the defendant's private office, and that the police took written notes thereof. In this connection the court further finds that the People have not produced such written notes in their entirety at the within hearing.

The People have not produced in this hearing any written notes or memoranda as to the contents of the lost diary or desk calendar. In the overall circumstances of this case, the conclusory assertions of the police witnesses that no information relevant to the issues of this proceeding was obtained by the People from the lost diary or desk calendar, cannot be taken probatively into account in the findings herein.

From the aforesaid findings it is concluded that the People obtain [sic] either from the wiretaps or from the search of September 2-3, 1960, or from both of these in combination, their original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based in the case of each of said females.

In as much as the arrest of the doctor was unlawful in that it was the fruit of wiretap activity now found by the court to have been illegal, the subsequent search of defendant's office immediately following his "arrest" was likewise unlawful. The People claim that the search was justified

because the defendant invited them to do so and consented thereto. There is a presumption against consent or waiver of a defendant's constitutional right to be free from unreasonable search and seizure and the People have the burden of affirmatively establishing free and voluntary consent (Johnson v. Zerbst, 304 U.S. 458; Pekar v. United States, 315 F. 2d 319; United States v. Smith, 308 2d 657, 663). The court finds that the People have failed to overcome this presumption and that the testimony concerning this phase of the proceedings, if anything, negates any such consent or waiver.

In view of the findings of the court, there is no need to make comment or evaluate the other points set forth in the briefs submitted by counsel for the defendant.

The motion is granted in all respects. Settle order.

APPENDIX E

Federal Constitutional Points Urged by Petitioner Before Justice Rinaldi, Supreme Court of New York, Kings County, Quoted from "Summary of Defendant's Points" in the Typewritten Memorandum of Law Before the Latter Court

(1) The wiretap order of July 28, 1960, was (a) unlawful and (b) unconstitutional. It was unlawful because issued in violation of the statutory requirement of "reasonable ground to believe that evidence of crime may be thus obtained" (Code Crim. Proc. §813-a); we shall show that this statutory standard of "reasonable ground' is (and since the decision of the *Mapp* case must be) construed as meaning the same as "probable cause" under the Fourth Amendment of the Federal Constitution. The statutory violation herein consisted, *first,* in the lack of a *reliably* founded showing of "reasonabe ground", i.e., the insufficiency of the supporting affidavits in that they were based on information allegedly given by Alvin Rosen and Audrey Salzman, informants of no proven reliability in regard to abortion charges against defendant Cohen or indeed against anyone. The statutory violation consisted, *second,* in the failure to show that a crime had actually been committed or was being then presently committed, as to which the wiretap would produce "evidence"; i.e., unless the affidavits showed that wiretap information would "evidence" a crime already allegedly committed or then being committed, then the wiretap must have been sought in order to obtain evidence of future crime, and this the statute does not authorize (nor does the Constitution). Further, even if the statute *arguendo* may be read as authorizing a wire-

tap upon "reasonable ground" to believe that evidence of future crime may be obtained, no such showing was made.

In any event, the statute is unconstitutional if read to authorize a wiretap for the obtaining of mere evidence as distinct from fruits or instrumentalities of a crime—a point which we develop rather fully later in this brief. Finally, the statute in allowing *any wiretapping at all* is unconstitutional in its entirety under the Supremacy Clause of the Federal Constitution (Art. VI) because, by establishing a permissive procedure for wiretapping, it contravenes §605 of the Federal Communications Act (Title 47 U.S.C.) as well as the Fourth Amendment (unreasonable searches) and the Fifth Amendment (self-incrimination) in combination with the Fourteenth Amendment (due process of law) of the Federal Constitution.

(2) The wiretap order being illegal and unconstitutional, all evidence obtained *via* the wiretap, whether consisting of leads or otherwise, is inadmissible under the amended §345(a) of the Civil Practice Act; now §4506 C.P.L.R., and should be ordered suppressed in the instant proceeding. It is important to note that the latter statute bars not only "evidence obtained through" an illegal wiretap but also "evidence * * * resulting from information obtained by any such act". In other words, evidence resulting from illegal wiretap-obtained *leads* is expressly barred by this statute.

(3) The amended §345(a) just mentioned is part of a nothing-less-than historic overhauling of the entire body of legislation in this State relating to both search-and-seizure in general and wiretapping in particular. This overhauling,

as we shall show in detail in this brief, has been done in obedience to the command of *Mapp* v. *Ohio*, 367 U.S. 643. The overhauling has included the adoption, for the first time in this State, of a comprehensive motion procedure for suppression of evidence obtained by illegal search (*Code Crim. Proc.* §§813-c to 813-e). This new motion procedure (invoked by us herein) is of special interest in one particular respect affecting the instant proceeding, i.e., the new motion procedure parallels the long-familiar Federal motion to suppress (Fed. Rules Crim. Proc. 41(e)) in which it is of the very essence of the procedure that the motion preferably be made at the earliest possible state before trial (see the explicit language to this effect in first sentence of *Code Crim. Proc.* §813-d). If, as we contend, these statutory changes in New York State (and the Federal Constitutional requirements which evoked them) have now imported into New York law the Federal standards of legal and reasonable search, then the new motion procedure (§§813-c et seq., *supra*) must include motions to suppress illegal wiretap evidence under the authoritative precedent of the parallel Federal motion procedure (F. R. Cr. P. 41 (e)) which applies to such wiretap situations (e.g., *United States* v. *Carney*, 188 F. Supp. 86 (E.D.N.Y. 1960)). Nor is this conclusion weakened by the fact that the New York §813-c refers only to "property, papers or things", because the Federal Rule 41(e) is even more restrictively worded (it mentions only "property") and yet it is applied by the Federal Courts in motion proceedings for the suppression of wiretap evidence and leads and not only for suppression of physical evidence seized in a search. Interestingly also,

both the New York (§813-c) and the Federal (Rule 41(e)) provisions contain a virtually identical sentence whose effect is to open up unlimitedly the power of the Court in such motion proceedings to decide the suppression issues in their most comprehensive scope ("The (Judge) (Court) shall (hear) (receive) evidence on any issue of fact necessary to the (decision) (determination) of the motion.").

(4) The illegal and unconstitutional wiretap was the indispensable source of the original alleged leads to all of the alleged female abortion complainants under the within five indictments. This topic takes up a major part of our detailed factual recitals later in this brief. Those leads and all evidence emanating therefrom should be suppressed. The conclusion just suggested that the leads came from the wiretap is indicated by even the limited testimony which the court allowed in this hearing concerning the wiretap operation. However, in view of the People's claim that these indicated wiretap leads were obtained in other ways, ways which were never satisfactorily (to put it mildly) explained by the People, and in view of the fact that this case involves both a wiretap and a subsequent search (both of which operations we contend were illegal), the question naturally arises as to whether or to what extent all or some of the leads came from that search which took place in defendant's office on September 3, 1960*. Unfortunately, the exploration of this extremely interesting question was severely handicapped by the unavailability of

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* This search and its illegality are more specifically noted in later paragraphs of this summary, and in our full argument treatment below.

the primary document which could have yielded the definitive answers to this question. This document, the defendant's office desk diary or calendar, was seized by the police in the search of September 3, 1960, but at the hearing herein they claimed they had "lost" or "misplaced" it. Thus, the People first tried to block altogether any disclosure of whether the leads came from the wiretap, they then tried to obscure such disclosure further by raising a cloud of vague hints and ambiguous assertions as to claimedly legal sources of such leads, and finally by "losing" or "misplacing" the all important desk diary they effectively blocked disclosure of whether the leads came from the illegal search and ultimate seizure of the desk diary rather than from the illegal wiretap. We argue in Point IV of this brief that this overall conduct of the People is in itself a sufficient ground requiring the granting of our motion to dismiss.

(5) Specifically, the illegal and unconstitutional wiretap was the indispensable source of the alleged lead to the alleged abortion complainant Esther Richards. The situation involving Esther Richards on September 2 and 3, 1960 was the sole ostensible basis for the arrest of the defendant on September 3 and for the search made assertedly incident to that arrest. Neither the search nor the arrest were made upon a warrant; they were based solely on the police officers' asserted probable cause to believe that the crime of abortion on Esther Richards had been committed; and this asserted probable cause, as just mentioned, was based on alleged happenings which were the product of illegal and unconstitutional wiretap leads.

Appendix E—Federal Constitutional Points Urged by Petitioner Before Justice Rinaldi, etc.

(6) We contend also that the defendant did not consent to the search of September 3, 1960, and that the People have not sustained their burden of proving any such consent or waiver.

(7) A further constitutional infirmity in the search is that it was unreasonable in scope and too remote in time from the arrest, insofar as it included a search of defendant's office in Brooklyn, the arrest having been made earlier at the defendant's home in Neponsit, Queens.

(8) The search was constitutionally obnoxious for the further reasons that it was unreasonable as a warrantless search made in the nightime, and that the overall conduct of the officers and the District Attorney preceding and during the arrest and search was unreasonable in the total atmosphere of the case; these overall features of the situation are additionally noted in later paragraphs of this summary. All evidence obtained in the search of September 3, 1960, and all evidentiary leads therefrom and the products of such leads, should be suppressed.

(9) An additional point which we urge with regard to the Esther Richards' situation is that the evidence allegedly obtained from her by the police on September 2, 1960—when she was forcibly intercepted and detained while riding in the private automobile of a friend, subjected to lengthy interrogation, forced to go to Kings County Hospital and there to undergo a gynecological examination, and thereafter forced to go to the District Attorney's office where she was subjected to further prolonged interrogation—should be suppressed because, in the overall circum-

stances thus presented, this was not "legal" evidence within the meaning of Code Crim. Proc. §249. We respectfully contend that, by virtue of the last-mentioned special statutory restriction in this State and under the tests laid down by the Supreme Court of the United States for evaluating the overall reasonableness of a search-and-seizure situation in terms of the "total atmosphere of the case" (see citations *infra*) and the overall conduct of the police officers, this extraordinary police conduct in extracting the alleged Esther Richards evidence is a matter which the defendant has legal standing to raise even though it was not he himself who was the direct and immediate physical victim of this police action.

(10) Further as to the search of September 3, 1960 and its relation to the wiretap:—Policewoman O'Meara inspected, during the search of defendant's office, his patients' index cards and his desk calendar or diary; the latter item she seized and took with her. Her inspection of these items was made with a view to checking a list which she had brought with her to defendant's office for this purpose. This list, which included names of female patients of the defendant, dates of their visits to the defendant, and other information, was at least in very large part the product of the illegal and unconstitutional wiretap. Thus, by utilizing the illegal wiretap-obtained list in conjunction with the illegally search-obtained index cards and diary, the police compounded the illegality of both the wiretap-obtained evidence and the search-obtained evidence.

(11) The overall circumstances of due process unfairness, as well as Fourth Amendment unconstitutionality,

which arise from the situation mentioned in the preceding paragraphs are aggravated by conduct of the police (or of the District Attorney's office, or of both) which, if it does not actually point to deliberate spoliation of evidence, at least points to the dire constitutional necessity of protecting the defendant against the consequences of a remarkable series of destructions, losses, misplacings and otherwise-occurring unavailability of records that are vital to the just determination of the within motion for suppression of evidence. The single most striking instance of this is the alleged loss or misplacing of defendant's desk calendar or diary, which was admittedly utilized by the police to develop leads for the indictment charges in conjunction with the wiretap-obtained leads.

(12) The overall due process unfairness of the tactics of the police and the District Attorney's office is aggravated also by their improper attempts to play cat-and-mouse with the defendant and with this Court in regard to various important facts of the admitted wiretap operations. The District Attorney insisted that disclosure of the contents of the wiretap—and even of individual police officers' participation in the wiretapping—should not be required in this proceeding because it would be a violation of Federal law, yet he blandly represented his readiness to make such disclosures at the trial of the indictments. Such a cynical announcement by a public prosecutor that he will himself choose the forum in which to violate the Federal law against wiretapping not only vitates any ostensible legal or good-faith justification for the Prosecutor's refusal to make the disclosure in this proceeding, but it also amounts to a

method of prosecution so outrageously unfair as to constitute a violation of due process of law.

(13) Finally, we shall develop at appropriate places throughout this brief the distressingly numerous instances in which the veracity of the police witnesses was indicatedly questionable. This unhappy theme needs to be developed because of its bearing on the previously mentioned tests which the United States Supreme Court has promulgated for the evaluation of the Fourth Amendment reasonableness of searches in terms of the "total atmosphere of the case" and the overall conduct of the police officers.

APPENDIX F

Federal Constitutional Points Urged by Petitioner Before the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Respondent's Brief" in the Latter Court

POINT I—The proceedings in the Court below were not barred, on any principle of *res judicata* or collateral estoppel, by reason of anything derivable from the proceedings before Mr. Justice Arkwright.

POINT II—The Court below had jurisdiction, power and authority to entertain and to decide the motion in its entirety, including the part of the motion addressed to the validity of the ex parte wiretap order.

POINT III—The Court below correctly ruled that the ex parte wiretap order was invalid under Code Crim. Proc. §813-a because based upon an inadequate showing of "reasonable grounds" and that the wiretap evidence and leads should be suppressed pursuant to C.P.L.R. §4506.

POINT IV—A. The following rulings of the Court-below are not directly assailed by the People in this appeal but are merely viewed by the People as "irrelvant":—(1) That the evidence on which the indictments were based was derived from wiretapping or from the search of September 2-3, 1960, or from both sources; (2) that the arrest and search of September 2-3, 1960 were unconstitutional both by reason of their being integrally connected with and derived from the antecedent illegal wiretap, and by reason of the utter lack of "probable cause" aside from the wiretap-obtained leads; and (3) that the search was not validated by any consent or waiver.

B. In view of the People's eschewal of argument on these issues, they should be deemed non-litigated by the People for the purposes of this appeal.

POINT V—In regard to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the order appealed from is proper because the conduct of the police officers fell far below the standards established by the Supreme Court of the United States under the test of "the overall atmosphere of the case".

The Applicable Fourth Amendment Standards: The Tests Laid Down By The Supreme Court Of The United States As To "The Total Atmosphere Of The Case" And "Particularized Evaluation Of The Conduct Of The Officers" Both Prior To And During The Arrest Or Search.

Spoliation of Evidence and Improper Keeping of Records.

The Unreasonable Extension Of The Scope Of The Search To Include Defendant's Office Premises In Brooklyn.

The Extraordinary Conduct of the Police in Extracting Alleged Admissions From The Complainant Esther Richards.

APPENDIX G

Points Urged by the Prosecution in the Appellate Division, Second Department, Supreme Court of New York, Quoted from Index to "Appellant's Brief" in the Latter Court

POINT I—The court below should have refused to entertain the motion under the principle of res judicata. The denial of the prior motion by Arkwright, J. (order of February 26, 1963) determined the law of the matter and precluded an application to any other justice of the same court for the same relief.

POINT II—The court below lacked power to entertain the motion to determine whether or not there had been illegal and unlawful use of wiretaps and for the suppression of evidence thereby procured.

POINT III—The original wiretap order of July 28, 1960 was validly issued upon proper affidavits.

POINT IV—The findings of fact made by the court below are irrelevant to the issue of this appeal.

POINT V—The order appealed from should be reversed.

APPENDIX H

Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

POINT I—The proceedings before Mr. Justice Rinaldi were not barred, on any principle of *res judicata* or collateral estoppel, by reason of anything derivable from the proceedings before Mr. Justice Arkwright.

POINT II—Mr. Justice Rinaldi had jurisdiction and power to entertain and to decide the motion in its entirety, including the part of the motion addressed to the validity of the wiretap order.

POINT III—A. The unelaborated conclusion of the Appellate Division that the wiretap affidavits were sufficient is error.

B. Mr. Justice Rinaldi correctly ruled that the wiretap affidavits were insufficient under the "reasonable grounds" requirement of Code Crim. Proc. §813-a.

C. If the wiretap affidavits be deemed in compliance with §813-a, there must then be reached the question of the constitutionality of that statute as applied to this case, and we urge that the statute as so applied is unconstitutional under the Federal Fourth Amendment because it authorizes a search for evidence of crime and not solely for property or for fruits or instrumentalities of crime.

POINT IV—People v. Dinan, 11 N.Y. 2d 350 should be overruled, and all evidence obtained or derived directly or indirectly from wiretapping in this case should be ex-

Appendix H—Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

cluded as violative of Federal Constitutional and Statutory Prohibitions, if the Court should find it necessary to reach these constitutional questions, i.e., if the wiretap evidence herein is not excluded on the ground of the insufficiency of the affidavit or on other anterior grounds.

POINT V—The judgment appealed from should be reversed because it was evidently rendered without regard to the issues, which were deemed independently decisive by Mr. Justice Rinaldi, as to the inextricably interwoven character of the wiretap with the indisputably unconstitutional search of September 2-3, 1960; and because in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far below the standards established by the Supreme Court of the United States under the test of "the overall atmosphere of the case".

Introductory: The Problem Of The Relationship Between the Search And The Wiretap.

The Applicable Fourth Amendment Standards: The Tests Laid Down By The Supreme Court Of The United States As To "The Total Atmosphere Of The Case" And "Particularized Evaluation Of The Conduct Of The Officers" Both Prior To And During The Arrest Or Search.

Spoliation of Evidence and Improper Keeping of Records.

Appendix H—Federal Constitutional Points Urged by Petitioner Before the New York Court of Appeals, Quoted from Index to "Appellant's Brief" in the Latter Court

The Unreasonable Extension Of The Scope Of The Search To Include Defendant's Office Premises In Brooklyn.

The Extraordinary Conduct of the Police In Extracting Alleged Admissions From The Complainant Esther Richards.

Conclusion To Point V: Further Remarks As To The Relationship Between The Wiretap And The Search, And As To The Possible Need For A Remand For Further Proceedings.

APPENDIX I

Points Urged by the Prosecution Before the New York Court of Appeals, Quoted from Index to "Respondent's Brief" in the Latter Court

POINT I—Code Crim. Pro. Section 813-a offends no Federal or New York State constitutional provision.

POINT II—The original wiretap order of July 28, 1960 was legally issued upon proper affidavits.

POINT III—The Appellate Division erred in holding that the denial by Arkwright, J. of the first motion to vacate and set aside the wiretap order of July 28, 1960 did not reach the question of the validity of that order and therefore did not bar a relitigation of an identical motion before Rinaldi, J. The Arkwright denial determined the law of the matter and precluded an application to any other Justice of the same court for the same relief.

POINT IV—No remand for further hearings is necessary.

The court should enunciate a rule prohibiting pre-trial motions to inspect wiretap affidavits and orders.

POINT V—The order appealed from should be modified so as to restrain and preclude the People from using upon the trial of the appellant only articles of evidence seized or examined by police officers of the City of New York in the defendant's home on September 2nd and 3rd, 1960, and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of articles of evidence so seized or examined; and as so modified, the order of the Appellate Division should be affirmed.

APPENDIX J

Statutes Involved

1. 47 U.S.C. §605

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such

information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

2. N.Y. Code Crim. Proc. §518-a

§ 518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken

In taking an appeal from an order granting a motion for the return of property or suppression of evidence or for the suppression of a confession or admission pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission in question, unless and until the order of return or suppression is reversed on appeal and vacated. Added L. 1962, c. 954, § 3; amended L. 1965, c. 846, § 3, eff. July 16, 1965.

3. N.Y. Code Crim. Proc. §813-a

§813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for

the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

4. N.Y. Code Crim. Proc. §§813-c to 813-e

§813-c. The motion in general

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, §1, eff. April 29, 1962.

§813-d. Time of making and determination

1. The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

2. If a motion has been made and denied before trial, the determination shall be binding upon the trial court, except that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined, except that, in the case of misdemeanors and offenses; the

court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

4. If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L.1962, c. 954, §1; L.1964, c. 490, eff. July 1, 1964.

§813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense has been filed in a court, and before the moving party has

been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty-two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court or at the time of the holding by the magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, §1, April 29, 1962.